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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Public Power Association respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorney for respondent Cities of Lafayette and Plaquemine, Louisiana, and of the Solicitor General of the United States has been obtained, but the attorney for the petitioner Gulf States Utilities Company has refused to consent.

The applicant, the American Public Power Association (APPA), is a national service organization. It has an interest in this case in that it represents more than 1,400 local, publicly owned electric utilities in 48 States, Puerto Rico, the Virgin Islands, and Guam. The Association's membership includes municipalities, public utility districts, cooperatives, and other consumer-owned public power systems. Many of these publicly owned utilities are affected directly and seriously by the decision in the court below.

The basic issue in this case is the extent of the duty of the Federal Power Commission to consider the impact of the antitrust laws of the United States in deciding whether or not to approve issuance of securities by public utility companies, pursuant to § 204(a) of the Federal Power Act, 16 U.S.C. § 824c(a). The Commission decided that it had no such responsibility, 44 F.P.C. 1524, 1526 (1970), contrary to the contentions of the Cities of Lafayette and Plaquemine, Louisiana. The Court of Appeals of the District of Columbia, on appeal, remanded the case to the Federal Power Commission and required that agency to take a "hard look" at the antitrust implications of Petitioner Gulf States' proposal to sell $30 million of first mortgage bonds. The Court of Appeals called the Commission's failure to give consideration to antitrust aspects of the problem before it "tunnel vision." 454 F.2d 941, 951 (D.C. Cir. 1971).

The applicant American Public Power Association has an interest in the rights of respondent Cities to a hearing before the Federal Power Commission on their allegations of an unlawful conspiracy to suppress competition in violation of the antitrust laws. These allegations were relevant to the Federal Power Commis-

sion's authorization of a securities issue which will have the effect of releasing revenues for continuation of anticompetitive practices, these being revenues which, absent the securities issue, would be committed to service of the short-term notes which are being thus refunded.

This right to a hearing derives from the "lawful object" and "public interest" language of § 204(a) of the Federal Power Act.

The American Public Power Association respectfully requests this Court to grant it permission to file its brief *amicus curiae* in this case.

Respectfully submitted,

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

INTEREST OF THIS AMICUS CURIAE

The American Public Power Association is a national service organization representing over 1,400 local, consumer-owned electric utility power systems in 48 States, Puerto Rico, the Virgin Islands and Guam.

They range in size from very large systems, such as the Department of Water and Power of the City of Los Angeles and Seattle City Light, down to the smallest of the consumer-owned systems, serving small rural communities. The Association's membership includes municipalities, public utility districts, cooperatives, and other consumer-owned public power systems.[1]

The right of Respondent Cities to a hearing before the Federal Power Commission on their allegations of an unlawful conspiracy to suppress competition in violation of the antitrust laws is of vital importance to the member electric power systems of the American Public Power Association. In our view, local, consumer-owned electric utilities have the right, under § 204(a) of the Federal Power Act, to a hearing to offer evidence that the Federal Power Commission is about to authorize the financing scheme of an investor-owned public utility, the proceeds of which will be used to support activities illegal under the federal antitrust laws. But this right was denied by the Federal Power Commission in the case at bar.

QUESTION PRESENTED

Does Section 204(a) of the Federal Power Act require the Federal Power Commission to consider allegations that an issuer of securities, who requests the Commission's approval of the issuance and sale thereof, is guilty of continuing antitrust violations, which will be facilitated in consequence of the proposed sale?

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[1] The NATIONAL POWER SURVEY of the Federal Power Commission (1970) reported (p. I-1-10) that of the 3,445 systems serving the country (excluding Alaska and Hawaii), more than 2,000 were publicly owned, principally by municipalities, and another 960 were rural electric cooperatives.

STATEMENT OF THE CASE

The Federal Power Commission's Decision

On October 12, 1970, Gulf States Utilities Company, which is engaged in generating, transmitting and selling electricity at wholesale and retail in Louisiana and Texas, applied to the Federal Power Commission, as required by §204(a) of the Federal Power Act, 16 U.S.C. § 824c(a), for authorization to sell $30 million of first mortgage bonds at competitive bidding. The application by Gulf States stated that the proceeds from the bond sale would be used to pay a portion of its commercial paper and short-term notes.

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana (Cities), filed a protest and petition to intervene in this proceeding, alleging that Gulf States had violated the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act. The Cities alleged that the proceeds of the bond issue would enable Gulf States to continue activities violative of the antitrust laws, by making it possible for the Company to devote funds to these predatory activities which funds otherwise would be used to redeem its short-term notes, absent the proposed securities issue.

Specifically, the Cities alleged that Gulf States, Louisiana Power & Light Company, and Central Louisiana Electric Company (Companies) were engaged in a conspiracy to defeat and suppress an interconnection and pooling agreement between the Cities, Dow Chemical Company (DOW) and Louisiana Electric Cooperative, Inc. (LEC), executed in August 1968.

They alleged that, in September 1964, the Rural Electrification Administration (REA) authorized a $56.5 million loan to LEC for construction of a generating

station and 1,611 miles of transmission lines. The Cities contended that the Companies, by means of repetitive and frivolous litigation, a public relations drive, and a lobbying effort against the REA loan, succeeded in delaying disbursement of the $56.5 million loan until the new REA Administrator was sworn in, in January 1969. As a result of this 5-year delay, from September 1964 until January 1969, the Cities, DOW, and LEC were prevented from going ahead with their interconnection and pooling agreement. In light of the rise in costs during the 5-year delay, the new REA Administrator advanced funds only for the LEC generating station and not for the transmission lines. LEC was forced to negotiate with the Companies for use of their transmission lines. The Cities contended that the conspiracy to defeat the pooling agreement continued during the negotiations between LEC and the Companies. The Cities alleged further that the Companies refused to supply transmission services between the Cities, DOW and LEC, demanded that LEC limit its power capacity, and required that all further power needs of LEC be supplied by the Companies.

The Cities requested that the Gulf States application to the Federal Power Commission for approval of its securities issue be set down for a hearing, unless Gulf States agreed to halt the alleged violations and remedy the damage done.

On December 3, 1970, the Federal Power Commission denied the Cities' application for a hearing and authorized Gulf States to issue the bonds. The Commission stated that the alleged violations were irrelevant to a Section 204(a) proceeding:

> "The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are

irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission." 44 F.P.C. 1524, 1526 (1970).

On December 16, 1970, the Cities filed a petition for rehearing, asking the Commission to clarify whether it considered the Cities' antitrust allegations irrelevant to Section 204 generally, or irrelevant because a refunding issue instead of new funding was involved. The Commission denied the Cities petition for a rehearing on January 13, 1971, without clarifying its prior decision.

The Court of Appeals Opinion

The Court of Appeals held that the Federal Power Commission had not fulfilled its duty to investigate the relevancy of the bond issue to the alleged antitrust violations and owed a "hard look" to the allegations of the Cities on remand. 454 F.2d at 954. The court held, *inter alia,* (454 F.2d at 953-54):

> "We do not consider what ruling we would make on the basis of such a position if thought through and embodied in FPC policy and findings. It suffices for present purposes to say that the FPC's terse and cryptic statement did not comply with the requirement we see in *Denver & Rio Grande,* that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion.
>
> "Accordingly we deem it necessary to remand the order under review.
>
> * * *
>
> "We have been at pains to set forth the latitude available to the agency in approach and procedure to obviate any concern that this court seeks to interfere with its exercise of discretion. What the

court does require is that the agency take a 'hard look' at problem areas." [Footnotes and citations omitted.]

I. ANTITRUST CLAIMS ARE RELEVANT UNDER § 204(a)'s "PUBLIC INTEREST" AND "LAWFUL OBJECT" LANGUAGE AS THEY ARE UNDER EVERY OTHER SECTION OF PART II OF THE FEDERAL POWER ACT

The declaration of policy governing Part II of the Federal Power Act is contained in Section 201(a), 16 U.S.C. § 824(a), which states:

> "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is *affected with a public interest,* and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary *in the public interest,* such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (Emphasis added.)

Section 204(a), involved here, prohibits any securities issue by a public utility without prior authorization of the Commission. Section 204(a) allows the Commission to authorize a securities issue:

> ". . . if it finds that such issue or assumption (a) is for some *lawful object,* within the corporate purposes of the applicant and compatible with the *public interest,* which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or

appropriate for such purposes." 16 U.S.C. § 824c (a). (Emphasis added.)

Note the almost exact repetition of the "public interest" mandates in Sections 201 and 204.

This "public interest" language in Section 201 is construed by the Commission (properly, we think) as compelling consideration of antitrust issues in proceedings to order an interconnection under Section 202, to approve acquisitions or mergers under Section 203, to review rates under Sections 205 and 206, and to review charges of inadequate service under Section 207. The Commission insists, however, that this common thread of the strong public interest, starting at Section 201 and ending at Section 207, while compelling consideration of antitrust factors in proceedings in all sections except Section 204, suddenly and inexplicably unravels in mid-course at that section and becomes inoperative there, and only there, resuming course in Section 205.[2]

The antitrust laws are a towering feature of the public interest, and Section 201, commanding the Commission to scrutinize the transactions over which it has authority in the light of the public interest, certainly did not turn that light off in the single case of a collision between a utility's financing scheme and the antitrust laws.

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[2] Indeed, the Commission's brief in Otter Tail Power Company v. United States, Supreme Court of the United States, Docket No. 71-991, October Term, 1971, page 10, urges that the Commission has plenary jurisdiction over antitrust issues. There is no rational explanation for claiming full antitrust jurisdiction in one case before this Court, while simultaneously abdicating this same responsibility under Section 204 in the present cause.

The raising of new money for the violation of the antitrust laws is not a "lawful object." It is incongruous that the Federal Power Commission recognizes its responsibility to prevent abuse of the antitrust laws by investor-owned utilities after a project is financed, yet fails to find in Section 204 authority to cut off such abuses at the pocket.

II. THIS COURT AND THE LOWER FEDERAL COURTS HAVE MADE IT PLAIN THAT THE ANTITRUST LAWS MUST COMPLEMENT EACH INDIVIDUAL AGENCY'S STATUTORY MANDATE, INCLUDING THAT OF THE FEDERAL POWER COMMISSION

This Court has held consideration of antitrust issues relevant to a federal agency's exercise of its statutory authority under an identical statute in a similar factual situation.

In *Denver & Rio Grande Western Railroad Company* v. *United States*, 387 U.S. 485 (1967), the petitioners, acting under § 20a of the Interstate Commerce Act, a statute which bears nearly word for word similarity to § 204(a) of the Federal Power Act, had protested Interstate Commerce Commission approval of a stock transaction between a railway express company and a motor carrier.

In *Denver & Rio Grande*, this Court reversed the court below and remanded the case to the Interstate Commerce Commission for consideration of antitrust issues. It said:

> "... the broad terms 'public interest' and 'lawful object' negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that

such broad statutory standards require at least some degree of consideration of control and anti-competitive consequences when suggested by the circumstances surrounding a particular transaction. 387 U.S. at 492.

* * *

"... when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws." 387 U.S. at 498.

As in the case now before this Court, the parties seeking to intervene in the federal agency's proceedings raised the substantial issue of possible antitrust violations. 387 U.S. at 490. They pointed out the necessity of an administrative hearing to examine the anti-competitive effects of the proposed stock issuance under the "public interest" and "lawful object" standards of § 20a of the Interstate Commerce Act. The contentions of the Cities in the present case are identical to those of the *Denver and Rio Grande* intervenors.

Equally significant for the present cause is the fact that § 204(a) of the Federal Power Act was modeled on the statute interpreted in *Denver & Rio Grande.* The Federal Power Commission itself has held that § 204(a) criteria for approval of security issues were "copied almost verbatim from Section 20a of the Interstate Commerce Act," *Pacific Power & Light Company,* 27 F.P.C. 623, 627 (1962). Thus *Denver & Rio Grande* stands as doubly important precedent in this case: the facts are nearly the same and the law is the same.

The Federal Power Commission's administrative conduct in this case exceeds, in terms of unreflective and insensitive brushing off of the antitrust laws, the agency action which this Court held not permissible in *Denver & Rio Grande.*

In *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), this Court unanimously held that § 15 of the Shipping Act of 1916, 46 U.S.C. § 801 *et seq.,* as amended, required the Federal Maritime Commission to employ the antitrust laws as "an appropriate refinement of the statutory 'public interest' standard." 390 U.S. at 246. In determining whether the limited immunity from the antitrust laws given to conferences of shippers in the Shipping Act removed the antitrust laws from the Federal Maritime Commission's purview altogether, this Court found that the antitrust concepts were "intimately involved" in the standards Congress set up to regulate shipping. 390 U.S. at 245.

In *McLean Trucking Company* v. *United States,* 321 U.S. 67 (1944), this Court upheld the merger of eight motor carriers which had been authorized by the Interstate Commerce Commission. Mr. Justice Rutledge found that the agency's duty was a dual one, both to its statutory mandate and to the antitrust laws:

> ". . . the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." 321 U.S. at 87.

This Court similarily upheld agency consideration of the antitrust laws in *National Broadcasting Company*

v. *United States,* 319 U.S. 190 (1943). The Court affirmed the regulation of chain broadcasting by the Federal Communications Commission, upholding the power of the Commission to deny a license to an applicant because he violated the antitrust laws. 319 U.S. at 222. The Court emphasized the agency's duty to consider the antitrust statutes:

> "By clarifying . . . the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce." 319 U.S. at 223.

Denver & Rio Grande, Aktiebolaget, McLean Trucking and *National Broadcasting* demonstrate the conviction of the courts that there is an area of overlap between the antitrust laws and the federal agency's specific assignment.

In the grey area where antitrust considerations and the agency mandate are both found, an agency like the Federal Power Commission is obliged to give effect to both legal schemes.

This concept of complementary regulation was specifically applied to the Federal Power Commission in *Northern Natural Gas Company* v. *Federal Power Commission,* 399 F.2d 953 (D.C. Cir. 1968). There, the court considered a challenge by gas companies to an order of the Federal Power Commission under the Natural Gas Act[3] authorizing the construction and

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[3] The judicial history of that Act closely parallels that of the Federal Power Act. F.P.C. v. Southern California Edison Co., 376 U.S. 205, 211 (1964).

operation of a natural gas pipeline. The Court of Appeals held that the Federal Power Commission's order would have serious anticompetitive effects and remanded the proceedings to the Commission, saying:

> "Although the [Federal Power] Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the [Federal Power] Commission is obliged to weigh antitrust policies." 399 F.2d at 958.

In *Northern Natural Gas* the Federal Power Commission was "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations." 399 F.2d at 961. "Public interest" has the same meaning in the twin statutes administered by the Federal Power Commission.

Judge Leventhal's cogent sentence in the opinion below expresses the Commission's obligation under Section 204(a) in these memorable terms:

> "However it is a fair consensus of the cases cited that the nation's profound and pervasive devotion to competition as a fundamental economic policy, and conviction that the public interest is disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, is applicable at least presumptively even in the case of monopolies or quasi-monopolies characterized by various degrees of government control and protection, subject of course to offset or rebuttal on analysis by the cognizant agency." *City of Lafayette, Louisiana* v. *FPC,* 454 F.2d 941, 948-49 (D.C. Cir. 1971).

The question here is not whether the Company was indeed guilty of violation of the antitrust laws, but whether the Commission should have heard evidence on the alleged violation.

The effect of the Commission's negative decision of this issue, if sustained, is that the proposed use of funds by a public utility for the violation of the antitrust laws, no matter how flagrant the alleged violation, is not relevant and need not be considered by the Federal Power Commission in deciding whether the public interest justifies approval of the sale of securities which will have the effect of releasing funds for such purposes.

The Court of Appeals called the Commission's decision "tunnel vision." 454 F.2d at 951. We agree.

III. THIS COURT HAS HELD PRACTICES ANALOGOUS TO THE PRACTICES COMPLAINED OF BY THE CITIES TO BE THE BASIS FOR A VALID CAUSE OF ACTION AS A VIOLATION OF THE ANTITRUST LAWS

The relevancy of the Cities' charges of antitrust violations, ignored by the Federal Power Commission, is highlighted by this Court's recent decision in *California Motor Transport Company* v. *Trucking Unlimited*, 404 U.S. 508 (1972), affirming the Ninth Circuit Court of Appeals, 432 F.2d 755 (1970).[4] The Court of Appeals had reversed the District Court's dismissal for failure to state a cause of action. In affirming the

[4] The Department of Justice itself has recognized the relevancy of the Cities' charges of antitrust violations in a letter from the Attorney General of the United States, dated Aug. 18, 1972, published in 37 Fed. Reg. 17775 (1972). The Department, in the letter, indicated that it is investigating "basically the same antitrust allegations" against Louisiana Power & Light as were set forth in the opinion below in the present case.

Court of Appeals, this Court held that the practices alleged constituted a cause of action as a violation of the antitrust laws.

The alleged predatory practices in *California Motor Transport,* closely analogous to the practices alleged in the case before this Court, were: first, obstruction of competitors' applications for assistance and approval of federal agencies; second, widely publicized blanket opposition, regardless of the merits, to efforts of competitors to improve their business positions; third, harassment through frivolous litigation in courts and agencies.

The obstruction in *California Motor Transport* was the 1961 opposition of the original defendant trucking companies to the filing of applications for certificates of public convenience and necessity by their competitors with the Interstate Commerce Commission and the California Public Utilities Commission. 432 F.2d at 762. The obstruction in the instant case is Gulf States Utilities' actions from September 1964, to January 1969, in denying the Cities and their partner, Louisiana Electric Cooperative, Inc., the use of a $56.5 million 1964 loan from the Rural Electrification Administration. 454 F.2d at 945.

The publicized opposition in *California Motor Transport* was the trucking companies jointly funded publicity campaign to intimidate their competitors and prevent further applications for certificates of public convenience and necessity. 432 F.2d at 762. The publicized opposition in the instant case was the mounting of a massive public relations drive and substantial lobbying effort against Louisiana Electric Cooperative, Inc., the Cities' partner in the interconnection and pooling agreement. 454 F.2d at 945.

In both *California Motor Transport* and the present case, the wrongdoers engaged in frivolous, repetitive and unsuccessful litigation. In both instances, the challenged practices were of sufficient anticompetitive quality to constitute a legal cause of action under the antitrust laws.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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